

FEDERAL COURT OF AUSTRALIA

Noeung v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCA 1304

MIGRATION – cancellation of subclass 104 Preferential Family (Remaining Relative) visa under s 128 Migration Act 1958 (Cth) – failure to comply with requirement to give notice under s 129 Migration Act invalidating the cancellation of the visa as jurisdictional precursor to enlivening of function under s 131 Migration Act notwithstanding operation of s 474 Migration Act

Migration Act 1958 (Cth) ss 101, 104, 115, 116, 128, 129, 131

Judiciary Act 1903 (Cth) s 39B

Migration Regulations 1994 regs 2.46, 2.55

Wang v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCA 167 discussed

Minister for Immigration and Multicultural and Indigenous Affairs v NAAV [2002] FCAFC 228 discussed and applied

Project Blue Sky v Australian Broadcasting Authority (1988) 194 CLR 355 referred to

Darko v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCA 775 referred to and discussed

Harihar Banerji v Ramsashi Roy (1918) LR 45 Ind App 222 cited

Burnham v Carroll Musgrove Theatres Ltd (1928) 41 CLR 540 cited

Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749 cited

Paul v Minister for Immigration and Multicultural Affairs (2001) 113 FCR 396 referred to and discussed

**TOUCH NOEUNG v MINISTER FOR IMMIGRATION & MULTICULTURAL &
INDIGENOUS AFFAIRS
N 262 of 2002**

**ALLSOP J
SYDNEY**

25 OCTOBER 2002

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

N262 of 2002

**BETWEEN: TOUCH NOEUNG
APPLICANT**

**AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL
AND INDIGENOUS AFFAIRS
RESPONDENT**

JUDGE: ALLSOP J

DATE OF ORDER: 25 OCTOBER 2002

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

The matter stand over to a date to be fixed for the making of orders to give effect to the reasons published today and for any further argument in relation thereto, including as to costs.

**IN THE FEDERAL COURT OF AUSTRALIA
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JUDGE: ALLSOP J

DATE: 25 OCTOBER 2002

PLACE: SYDNEY

REASONS FOR JUDGMENT

- 1 The applicant is a Cambodian national. She was born on 11 April 1976.
- 2 On 16 August 1995, the applicant lodged an application for a visa under subclass 104, being a Preferential Family (Remaining Relative) visa. The application form contained questions with various alternatives to tick which, relevantly, the applicant answered as follows:
 - Show your marital status*
 - *Never married*
 - Have you previously been married or been in a de facto/common law relationship?*
 - *No*
- 3 The application form also contained questions about the existence of children, but the provision of answers to those questions was predicated on an affirmative answer to the second question referred to in [2] above.
- 4 The applicant lodged her application in Cambodia. On 12 October 1999 (over four years after the application) an officer of the Department, located in Phnom Penh, signed a letter which was sent to the applicant, advising her that her visa had been granted that day. The

letter advised the applicant that she must first enter Australia, no later than 7 September 2000. She did so. The letter also contained the following information:

Other conditions are as follows:

Condition 9204/8515: That you do not marry before entering Australia.

The visa permits unlimited travel and entry to Australia until 11 October 2004 and indefinite stay on arrival provided entry is made before that date [7 September 2000]. If you wish to travel overseas and return to Australia after that date you will need to obtain a resident return visa.

...

Change of circumstances

*You are reminded that **you must continue to notify the Department of Immigration and Multicultural Affairs if your circumstances change so that any answer given in your application form, or any information given in relation to your application, is no longer correct.** The obligation to notify is in respect of changes of circumstances before you are given permission to leave the airport or seaport on arrival in Australia.*

Incorrect Information

You are also reminded that you must advise the Department of Immigration and Multicultural Affairs if at any time you find that any information you have given to the Department is incorrect. This obligation continues after arrival in Australia.

[emphasis added]

5 On 7 February 2002, while the applicant was in Cambodia, a delegate of the respondent Minister, located in Phnom Penh, cancelled the applicant's visa under s 128 of the *Migration Act 1958* (Cth) (the Act).

6 Section 128 is in the following terms:

128 Cancellation of visas of people outside Australia

If:

- (a) the Minister is satisfied that:*
 - (i) there is a ground for cancelling a visa under section 116; and*
 - (ii) it is appropriate to cancel in accordance with this Subdivision;*
 - and*
 - (b) the non-citizen is outside Australia;*
- the Minister may, without notice to the holder of the visa, cancel the visa.*

7 The record of decision of the Minister's delegate indicates that the delegate considered that there were grounds for cancellation of the visa under par 116(1)(d) and s 101 of the Act. Section 116 provides various grounds upon which the respondent may act to cancel a visa. The relevant paragraph (par 116(1)(d)), with an interpolation of the extended meaning of "enter" as including re-enter (see s 5), is in the following terms:

116(1) Subject to subsections (2) and (3), the Minister may cancel a visa if he or she is satisfied that:

...
(d) if its holder has not entered [or re-entered] Australia or has so entered [or re-entered] but has not been immigration cleared – it would be liable to be cancelled under Subdivision C (incorrect information given by holder) if its holder had so entered [or re-entered] and been immigration cleared;
...

8 Subdivision C, referred to in par 116(1)(d) above, included s 101, which is in the following terms:

101 Visa applications to be correct

A non-citizen must fill in his or her application form in such a way that:

- (a) all questions on it are answered; and*
- (b) no incorrect answers are given.*

9 The record of decision discloses, in three separate places, that the provision apparently relied upon to substantiate the exercise of the power provided for by par 116(1)(d) and s 128, was s 101: that is, incorrect answers or incorrect information contained in answers in the application form.

10 The record of decision sets out the "reasons" for the delegate's view that there were "grounds for cancellation under paragraph 116(1)(d) – subsections 101 [sic]." The "reasons" were recorded as follows:

- *The visa holder has provided incorrect information in her application form pertaining to her marital status and previous defacto relationship. This misleading information has been provided by NOEUNG Touch in order to obtain an immigration advantage:*
- *She provided false and incorrect information about her marital status as she was in a defacto relationship with KEO Sithat and they had a child, KEO Sophavatey, together born on 29/6/1999.*

- *She failed to notify her change of circumstances in her marital status (of her defacto relationship) and that she had a child throughout the processing of her application, after the visa was granted nor did she notify, as was her obligation under law, before she was given permission to leave the airport on arrival in Australia. This obligation to notify any changes of circumstances was highlighted in the visa holders [sic] approval letter.*

11 The material adjacent to the first bullet point, at [10] above, was plainly directed to s 101. It stated that the applicant had given incorrect information “in her application form”.

12 The material adjacent to the second bullet point, at [10] above, appeared to be directed to the further provision of information, which was both “false and incorrect information”. The relationship between these matters and s 101 was thus far from clear.

13 The material adjacent to the third bullet point, at [10] above, appeared to be irrelevant to s 101. It would appear that this information was relevant to the obligations within s 104 of the Act, being obligations to which the applicant had been directed by the letter of 12 October 1999, under the heading “Change of circumstances” ([4] above). Relevantly, s 104 is in the following terms:

104 Changes in circumstances to be notified

(1) If circumstances change so that an answer to a question on a non-citizen’s application form or an answer under this section is incorrect in the new circumstances, he or she must, as soon as practicable, inform an officer in writing of the new circumstances and of the correct answer in them.

...

(3) If the applicant is outside Australia at the time the visa is granted, subsection (1) only applies to changes in circumstances after the application and before the applicant is immigration cleared.

14 The record of decision continued as follows:

Reason why it is considered appropriate to cancel without notice under s 128:

It is suspected that the visa holders [sic] reaction to possible visa cancellation under s 116 could be to attempt to travel to Australia while she remains the holder of the visa in the belief that visa cancellation would be more difficult once she is in Australia.

*I have taken into consideration that fact that a non-citizen whose visa is cancelled overseas will not have a right to seek merits review in Australia. Where cancellation is under section 128, the non-citizen will have had no prior opportunity to state a case nor any warning which could allow them to return to Australia where merits review would be available if the visa is subsequently cancelled. **However, in my opinion there is a high degree of proof in this case and therefore more than justifiable grounds for cancellation under section 128 (grounds s 116(1)(d), sub-ground s 101).***

Part D: DECISION

In view of the findings and assessment above, I have decided to cancel the visa holder's visa.

[emphasis added]

- 15 On the day upon which the decision was made, the delegate signed a letter which was hand delivered, together with the record of decision, to the applicant's nominated post office box in Phnom Penh. The letter, set out in full, was in the following terms:

I wish to advise that your visa was cancelled on 7 February 2002 under section 128 of the Migration Act 1958 because you did not comply with subsection 101 [sic] of the Migration Act 1958. You have provided incorrect information and made false and misleading statements in regard to your marital status and that you had been in a defacto/common law relationship in your application for a subclass 104 Remaining Relative visa. You also failed to notify the Department of Immigration and Multicultural and Indigenous Affairs of your change of circumstances, in that you had a child prior after [sic: after] you lodged your application and prior to your visa being granted, and therefore the information in your application was no longer correct.

The Migration Act 1958 gives you the opportunity to comment on why you think the ground for cancellation does not exist and/or to give reasons why your visa should not have been cancelled.

If you are able to show that the ground for cancellation does/did not exist, the cancellation of your visa will be revoked. If you cannot show that the ground for cancellation does/did not exist, but there is a reason why your visa should not have been cancelled, the cancellation of your visa may be revoked.

You should respond to this Notice by 7 March 2002. There is no provision for this time frame to be extended. If you do not respond by the above date, the revocation of the cancellation of your visa will not be considered.

As you are no longer the holder of an Australian visa, you are not entitled to travel to Australia. If you do you will be refused immigration clearance and will be removed from Australia. Relevant agencies in Australia have been advised that your visa has been cancelled.

[emphasis in original]

You may wish to make another application for a visa, however I can give no indication of the possible outcome of that application. You should contact your nearest Australian mission for further information.

- 16 This letter, read together with the enclosed decision record, is relied upon by the respondent as a notice complying with the requirements of s 129 of the Act. Section 129 is in the following terms:

129 Notice of cancellation

- (1) If the Minister cancels a visa under section 128, he or she must give the former holder of the visa a notice:*
 - (a) stating the ground on which it was cancelled; and*
 - (b) giving particulars of that ground and of the information (not being non-disclosable information) because of which the ground was considered to exist; and*
 - (c) inviting the former holder to show, within a specified time, being a prescribed time, that:*
 - (i) that ground does not exist; or*
 - (ii) there is a reason why the visa should not have been cancelled; and*
 - (d) stating that, if the former holder shows, within the specified time, that the ground does not exist, the cancellation will be revoked; and*
 - (e) stating that, if the former holder shows that there is a reason why the visa should not have been cancelled, the cancellation might be revoked.*
- (2) The notice is to be given in the prescribed way.*
- (3) Failure to give notification of a decision does not affect the validity of the decision.*

- 17 The applicant relies on a number of defects in the letter and decision record (to which I will compendiously refer hereafter as the Notice) as a notice under s 129. One such defect so relied upon concerned the time given to the applicant to furnish a response.

- 18 The letter of 7 February 2002 required a response by 7 March 2002. This gave the applicant twenty-seven clear days in which to respond, 7 March being the twenty-eighth day after (but not including) 7 February. Paragraph 129(1)(c) requires a time to be specified in the notice, “being a prescribed time” within which the former visa holder is invited to show the matters set out in pars 129(1)(c)(i) and (ii).

- 19 Regulation 2.46 in Div 2.9 of Pt 2 of the Migration Regulations 1994 specifically deals with the time to respond to notice of cancellation under par 129(1)(c). It provides, relevantly, as follows:

For the purposes of paragraph 129 (1) (c) of the Act (which deals with response to cancellation of a visa), the following periods are prescribed:

- (a) if the former holder of the visa is outside Australia when he or she is given a notice of the cancellation — 28 days;*
- (b) if he or she is in Australia when he or she is given notice of the cancellation:*
 - (i) if he or she wishes the cancellation to be reconsidered while he or she is in Australia — 5 minutes; or*
 - (ii) if he or she wishes the cancellation to be reconsidered while he or she is outside Australia, and he or she departs Australia as soon as possible after being given a notice of the cancellation — 28 days;*

beginning when the former holder of the visa is given a notice of the cancellation.

20 The evidence before me discloses that a driver hand delivered the Notice to a post office box in Phnom Penh on 8 February 2002. There was no evidence before me as to when the Notice was in fact received by the applicant. However, reg 2.55 is here relevant. By par (1)(c) of reg 2.55:

(1) This regulation applies to:

- ...*
- (c) the giving of a document to a holder or former holder of a visa relating to the revocation of the cancellation of a visa under the Act.*
- ...*

21 Under par (3) of reg 2.55:

- (3) For a document mentioned in paragraph (1)... (c), the Minister must give the document in one of the following ways:*
 - (a) by handing it to the person personally;*
 - (b) by handing it to another person who:*
 - (i) is at the person's last residential or business address known to the Minister; and*
 - (ii) appears to live there (in the case of a residential address) or work there (in the case of a business address); and*
 - (iii) appears to be at least 16 years of age;*
 - (c) by dating it, and then dispatching it:*
 - (i) within 3 working days (in the place of dispatch) of the date of the document; and*
 - (ii) by prepaid post or by other prepaid means; to the person's last residential address, business address or post box address known to the Minister;*
 - (d) by transmitting the document by:*
 - (i) fax; or*
 - (ii) e-mail; or*
 - (iii) other electronic means;*

to the last fax number, e-mail address or other electronic address known to the Minister.
[emphasis added]

22 Paragraph (7) of reg 2.55 provides a deemed date of receipt in respect of a document which is despatched in the manner contemplated under par (3)(c). It is in the following terms:

- (7) *If the Minister gives a document to a person by dispatching it by prepaid post or by other prepaid means, the person is taken to have received the document:*
 - (a) *if the document was dispatched from a place in Australia to an address in Australia — 7 working days (in the place of that address) after the date of the document; or*
 - (b) *in any other case — 21 days after the date of the document.*

23 Mr Henry, who appeared for the applicant, submitted that the combined effect of par 129(1)(c), reg 2.46 and reg 2.55 pars (3)(c) and (7) required that the Notice specify twenty-one days after the date of the document (reg 2.55 par (7)) and twenty-eight days thereafter (reg 2.46): making 28 March 2002 (not 7 March) the last day for the applicant to respond.

24 Mr Smith, who appeared for the respondent, submitted that there was a disconformity in language between deemed *receipt* in par (7) of reg 2.55 and the former visa holder being *given* the Notice, as referred to in reg 2.46. He submitted that the time ran from the time of actually being given the Notice (which on the evidence here the applicant had not proved). I do not accept this submission. Reg 2.46 (“given”) and par (7) of reg 2.55 (“received”) is linked by par (3) of reg 2.55, which uses the words “must give”. The words “given”, “giving”, “give” and “received” are being used synonymously in different parts of speech referable to the same event (the becoming aware of the Notice) from the two perspectives of the transmission of the information. Also, par 129(1)(c) refers to a “way” which is “prescribed”. It is necessary to be able to specify in the Notice under s 129 the expiry of the invitation. If the Notice is to be delivered by the method in par (3)(c) of reg 2.55, that can only be done with certainty if the deeming provision in par (7) is relevant. Any specification based on twenty-eight days after actual receipt would be impossible since the date of actual receipt at the time of despatch of the Notice by a method under par (3)(c) of reg 2.55 is an event to occur on an unknown day in the future. Hence the need for a deeming provision.

25 Thus, the Notice was defective, at least in one respect. It should have given the applicant until 28 March 2002 to respond.

26 To return to the narrative of events concerning the Notice, on 8 March 2002, solicitors acting for the applicant sent two letters by facsimile to the delegate. The first was a letter requesting an extension of time in which to respond. It was in the following terms:

I have received instructions to act for Ms Noeng [sic] in this matter and enclose her authority to do so.

I request an extension of 14 days in which to make submissions. I note that there is no restriction on giving such an extension in the Migration Act 1958 (the Act) or its attendant Regulations.

Further, I note that the Notice is dated 7 February, 2002 and apparently sent to a post office box in Phnom Penh in which case 21 days are prescribed for receipt of the letter the Act s 494C(4)(b).

Please confirm by return fax that either, 1. the extension is granted or 2. the 21 day deemed receipt provisions apply.

27 The authority of the applicant referred to in the first paragraph of the above letter was not in evidence. I do not know when the solicitors commenced to act for the applicant. The references to par 494C(4)(b) were to provisions to like effect as contained in reg 2.55 pars (3) (c) and (7) to which I have made reference, above. The matter was argued before me on the basis that the regulations to which I have referred are the correct source of the assertion as to the entitlement to more time.

28 The second letter sent by the applicant's solicitors to the delegate by facsimile enclosed two statements: one of the applicant and one of a Mr Sithat Keo. At the time, the applicant was seeking to sponsor Mr Sithat Keo in a visa application made by him. The letter of the solicitors contained the following:

I note the explanation set out in the statement of Ms Neong [sic] and submit that, in the absence of any evidence to the contrary, there is no reason to disbelieve what she says. I further note that in your decision you refer to "a hight [sic] degree of proof in this case" and would be obliged to receive details of what this proof is.

I would also be obliged to know what opportunity was given to Ms Neong [sic] to comment on this "proof" prior to making your decision.

As I now act for Ms Neong [sic] you should address all future correspondence to me at the above address.

- 29 It will be apparent, shortly, when I discuss the enclosed letter from the applicant, what it was to which Mr Turner, the applicant's solicitor, was referring by way of the applicant's "explanation". The Minister's delegate's reference to a "high degree of proof" (see the record of decision at [14] above) obviously concerned the solicitor. Also, the last sentence of the letter indicates that he was *now* acting for the applicant.
- 30 Before turning to the letters of the applicant and Mr Sithat Keo, it is appropriate to analyse a little further the elements of the Notice. Leaving aside, for the moment, the failure to expressly identify s 104 of the Act, the following was clear from the Notice:
- (a) The first sentence of the letter of 7 February 2002, set out at [15] above, identified a breach of s 101.
 - (b) That first sentence is to be read with the second sentence.
 - (c) The second sentence may not be limited to incorrect information at the time of the original application.
 - (d) The third sentence dealt with a failure to disclose information about having a child after the application.
 - (e) The information adjacent to the first bullet point in the decision record, set out at [10] above, reflected the *incorrect* information at the time of application for the purposes of s 101 (see (a) and (b) above). Though this paragraph ends in a colon, I take that to be a typographical error: it should be a full stop.
 - (f) The information adjacent to the second bullet point in the decision record, set out at [10] above, referred to *false* and incorrect information "provided" in connection with the applicant's marital status and the existence of a child. The addition of the adjective "*false*" is important. It is, perhaps, not clear whether the paragraph was referring to the provision of false and inaccurate information at the time of the application or the provision of false and inaccurate information after the application. This ambiguity is important, as will become evident in due course. The information about the child could not found an allegation of the provision of false or incorrect information in the application. The child was not born at the time of the application, as the delegate knew. Given that the third bullet point deals with failure to disclose, I would read the second bullet point as referring to the provision of false and incorrect information about the applicant's marital status and about the child, in part, at least, after the application.

- (g) The information adjacent to the third bullet point appears to identify the information about the applicant's marital status as information arising after the signing of the application form. That is, it appears to recognise (as indeed it appears to be the fact) that the relationship between the applicant and Mr Sithat Keo arose after 1995. This paragraph also referred to the information about the child not being disclosed "throughout the processing of her application", after the grant of the visa and on clearance at the airport in Australia.
- (h) The decision record, in the last paragraph, referred to the existence of a "high degree of proof in this case" and concluded that there were "more than justifiable grounds for cancellation".

31 The letter signed by the applicant and sent under cover of Mr Turner's letter of 8 March 2002 was dated 4 March 2002. It was detailed and clear. Despite its length, it is appropriate that I set it out in full (typographical errors appear in original):

Subject: Notification of cancellation of visa under Section 128 of the Migration Act 1958: Ms Touch Noeung.

I have received your notification of my visa cancellation under section 128 of the Migration Act 1958, while I was in Cambodia, outside Australia, for the following reasons:

- *"I provided incorrect information in my application form pertaining to my marital status and previous defacto relationship;*
- ***I provided false and incorrect information about my marital status as I was in defacto relationship with Keo Sithat and we had a child, Keo Sophavatey, together born on 29/6/99;***
- *I failed to notify my change of circumstances in my marital status (of my defacto relationship) and that I had a child through the processing of my application, after the visa was granted, nor did I notify before I was given permission to leave the airport in Australia".*

I wish to provide the following reasons and comments on why my visa should not have been cancelled and therefore request your consideration upon the revocation of this cancellation:

1) My immigration history:

On 16 August 1995, I lodged an application for migration to Australia under the subclass 104, Remaining Relative visa. In my application, I stated that I was single. My parents and siblings were all deceased.

I wish to provide the true and correct information related to the relationship between Keo Sithat and me prior to my departure to Australia in order to show that my marital status was single, neither married nor in defacto

relationship with Keo Sithat. *I met and knew him in 1993, while I was a student at the Teacher training School. Keo Sithat used to come to play soccer at the playground located at ChauPongneayat Primary School, next to my school. During my training (1 Year) in Phnom Penh, we often talked to each other and made good friends. In 1994, I returned to live at Phum no 4, Khum Preah Punlea, District of Sisophon, province of Banteaymeanchey and worked as teacher at the Preschool of Sophy. In 1998, after finishing his university study, Sithat moved from Phnom Penh to work as taxi driver for Mr. Pong, living at Phum Thumnup Chrey, Khum Tuk Thla, province of Banteay Meanchey. As he knew my address, he often went to see me and proposed to have love affair with me. After waiting for the processing time of my application for migration to Australia over 3 years with no hope to receive the approval from the DIMIA to allow me to settle in Australia, I could not resist to the strong persuasion of Keo Sithat to have the love affair with me. As the story of our love affair was leaked to Sithat's mother and family, his mother strongly objected to our relationship and then forced Keo Sithat to brake away from me. Keo Sithat, who had received strong pressure from his mother and family, had changed a lot by causing too much trouble to me such as using domestic violence. Most of the times, when coming to see me, he was angry with me for not having enough money to satisfy him at his demand and for other reasons. Before and even after my pregnancy (October 1998), he occasionally used his violence by knocking painfully my body and head and also hurting me a lot. I had been badly maltreated by Keo Sithat during my relationship with him. There had been also other bad behaviour conducted by Sithat towards me, which led me to brake down our relationship. We had been living separately from each other since the commencement of my pregnancy. He did not come to see me again. He did not even know when I gave birth to my daughter Sophavatey and has never taken care of me during my pregnancy. Since I was pregnant, Keo Sithat has left me to live in Phnom Penh without having made any further contact or maintained relationship with me at all. I had been still living alone at Sisophon, province of Banteay Meancchey.*

Keo Sithat did not get married with me or live in a defacto relationship at all. We did not celebrate the wedding ceremony and did not have the marriage certificate registered by the local authority.

Due to the above mentioned experience of domestic violence committed by Keo Sithat towards me, and as our relationship had been broken down since my pregnancy, I had suffered severe hurt and great distress before and after the birth of my daughter Sophavatey. I did not have any intention whatsoever to keep Sophavatey, born 29/6/99, to live with me, because I had also been experienced with severe hardship, such as lack of necessary funds to support her. Since her birth, Sophavatey was transferred to Keo Sithat, her father, who has been responsible for taking care of her. Although I gave birth to Sophavatey, but she has been raised by Keo Sithat, since her birth. Sophavatey has not been living with me at all and I was not responsible for taking care of her. Before my departure to Australia, I did not consider Sophavatey as my daughter, because Keo Sithat had made my feeling severely hurtful and distressful during our relationship.

Based on the above mentioned reasons, I did not notify the DIMA that I was married or in defacto relationship with Keo Sithat or I had a child with him, prior to my departure to Australia. During that time, I believed that my marital status was still single, because I was not married or in defacto relationship with Keo Sithat and was living separately from Keo Sithat, since the start of my pregnancy and before my departure to Australia.

Prior to my departure to Australia, Keo Sithat and I were not in a genuine and continuing relationship as spouse. We did not have a mutual commitment to a shared life together as husband and wife. Therefore, my marital status should be considered as single.

I wish to request the Second Secretary (Immigration) Australian Embassy, Phnom Penh to kindly disregard my failure to notify the change of circumstances (child birth), as ground for my visa cancellation, because if this change of circumstances was notified to DIMIA, I think that my application for migration to Australia as last remaining relative, by including my dependent child, was still eligible for consideration to immigrate to Australia.

As there were no change of circumstances in my marital status, the information provided in my application form as single was correct. I did not fail to provide the notification of change of circumstances about my marital status.

I wish therefore to kindly request you to give sympathetic consideration upon my case that the above ground of cancellation did not exist and my visa should not have been cancelled, the cancellation should be revoked.

2) Sponsorship of Keo Sithat as fiance

After my arrival in Australia on 27/10/99, I could see that the economic and social situation and living conditions in Australia were far more developed than Cambodia. I had different feeling from when I was in Cambodia. I had home sick and thought too much about my daughter, but was still hurtful about my past experience with Keo Sithat.

A few months later, after arriving in Australia, I received letters from Keo Sithat sending my daughter photos and his photos to me and making apologies for his bad mistakes during his relationship with me. He also requested me to forget my past distressful experience cause by his act. After carefully giving consideration on his request and after long separation from my daughter, I had the new feeling and sympathetic sentiment to accept the apologies of Keo Sithat, especially I had great sorry for not taking care of my child since her birth. I missed my daughter, whom I need to be united with me. Therefore, Keo Sithat and I have made a mutual reconciliation to resume contact and reestablish relationship to be future spouses. We decided to love each other and had mutual commitment to a shared life together as husband and wife and to be in genuine and continuing relationship. Keo Sithat lodged the application for migration to Australia as prospective spouse to the

Australian Embassy on 29 June 2000.

We exchanged letters and telephone calls since the end of 1999 and on 20/3/2001, I came to Cambodia to visit Sithat and Sophavatey.

As explained above in details, I can see that during my stay in Cambodia there was no change of circumstances regarding my marital status. The relationship between Sithat and me was broken down since my pregnancy started in October 1998. Therefore, I was not married or in defacto relationship with Sithat during that time. The existence of my daughter would not change my marital status from single to married or in defacto relationship at all.

However, during my stay in Australia, as my relationship with Keo Sithat was resumed after mutual reconciliation, Sithat can be considered as fiancé, and not husband as stated by the PMO. That is the reason why I lodged the sponsorship for migration to Australia of Keo Sithat as prospective spouse. This was not the reason as ground for cancellation of my visa.

I therefore wish to request the Second Secretary (Immigration Section) to reconsider your decision to cancel my visa under section 128 of the Migration Act 1958. I also wish you to kindly revoke the cancellation of my visa as from this date.

Your kind consideration with sympathetic and humanitarian ground upon my request for revocation of the cancellation of my visa is highly appreciated. The cancellation of my visa has caused severe hardship for my brother family and me who both have mutual commitment and are liable to pay loan and mortgage during my living in Australia. I also wish to request you to take into consideration about the period of my visa approval from 13/10/99 to 7/2/2002, which is over 2 years and 4 months, and this period of stay should permit me to apply for Australian citizenship, if I were in Australia.
[emphasis added]

- 32 The emphasised bullet point below the first paragraph of the above letter reveals, I think, that the applicant took the second bullet point, set out at [10] above and discussed at [30] above, as meaning that she had provided “false and incorrect information” after the date of the application.
- 33 The letter appears to deal in a comprehensive fashion with the beginnings of the relationship with Mr Sithat Keo, the love affair, the birth of a child, the at times stormy and sometimes violent nature of the relationship, the fact that they did not live together as man and wife, the unhappiness of the applicant, the giving up of the child to the father, the reconciliation of the two and the desire now to sponsor Mr Sithat Keo and their child to come to Australia. If I may say so, the letter is expressed in a coherent way and recounts a story of the life of two

young people resonant of timeless human affairs.

- 34 The letter of Mr Sithat Keo, also dated 4 March 2002, bearing the same post office box address as the applicant's letter, was in the following terms:

I refer to my application for migration to Australia under subclass 309, (Provisional Spouse visa) and your letter dated 4 February 2002 requiring Ms Touch Noeung, Keo Sophavatey and I to undergo DNA testing with laboratories in Australia.

As the test is very costly and due to my financial difficulty, I wish to inform you that Ms Touch Noeung, Keo Sophavatey and I are not able to undergo DNA testing as requested.

I wish to provide herein my statement to rectify the information provided in my application for migration to Australia and statement of Ms Touch Noeung in her Statutory Declaration to be changed as follows:

- 1. Keo Sophavatey is the real daughter of Ms Touch Noeung;*
- 2. Ms Noeung Touch and I were not married or [in a] defacto relationship prior to 30/3/2001. Although we had a child Sophavatey born on 29/6/99, Touch Noeung and I were not in a genuine or continuing relationship as spouses. We did not have a mutual commitment to a shared life together as husband and wife at all.*

Your kind and sympathetic consideration upon my application is highly appreciated.

[emphasis added]

- 35 The content of this letter is a trifle puzzling, if one only has recourse to the Notice and the letter of the applicant. There appears to be no need for DNA testing as the applicant, in her letter, at [31] above, freely conceded her maternity of the child. The third paragraph of Mr Sithat Keo's letter, which is emphasised, implies some inaccuracy in information provided in Mr Sithat Keo's application for migration; and in this connection, there appears to be an inaccuracy in a statutory declaration of the applicant. I use the word "inaccuracy" because of the use by Mr Sithat Keo of the word "rectify".

- 36 By letter dated 7 March 2002, though dealing with the matter after the consideration of the response contained in the second letter of the applicant's solicitor, Mr Turner, and the enclosed letters of the applicant and Mr Sithat Keo, the delegate notified the applicant of the refusal to revoke the decision to cancel the visa. This refusal was in purported exercise of the statutory function contained in s 131 of the Act. Subsection 131(1) is in the following terms:

- (1) *Subject to subsection (2), after considering any response to a notice under section 129 of the cancellation of a visa, the Minister:*
- (a) *if not satisfied that there was a ground for the cancellation; or*
 - (b) *if satisfied that there is another reason why the cancellation should be revoked;*
- is to revoke the cancellation.*

37 The letter of the delegate of 7 March 2002 was in the following terms:

On 7 February 2002 you were notified that your visa was cancelled under section 128 of the Migration Act 1958. You responded by letter hand delivered to this Embassy on 05 March 2002.

After considering your response, the Department has decided not to revoke the cancellation of your visa under section 131 because I am not satisfied that you have been honest with this office and I find that you have provided incorrect and false information in your application for a subclass 104 visa by failing to inform the Department of your relationship with KEO Sithat and that you had a child (KEO Sophavatey) resulting from this relationship prior to migrating to Australia.

I find that your claim that you were never in a defacto relationship with KEO Sithat is unsustainable. When officers from this Embassy visited KEO Sithat's village they spoke with Moeung Sen the Governor of Chbarmon District. Mr Moeung Sen is a very senior official and confirmed that he knew KEO Sithat and you very well. In fact Moeung Sen was the previously Governor of Udong District (KEO Sithat's home village) and he knew Keo Sithat's family quite closely. When Mr Moeung Sen was transferred to the position of Governor of Chbarmon District KEO Sithat came to live in Mr Moeung Sen's house for a few years from 1997/98 until 2000 when he moved to Phnom Penh. Mr Moeung Sen confirmed that you were the mother of KEO Sophavatey and KEO Sithat was the father. Mr Moeung Sen also confirmed that both you and KEO Sithat had lived in a defacto relationship before you moved to Australia. On balance I find that this information provided by the Governor of Chbarmon District far more credible than these new claims that you and KEO Sithat are now advancing.

The credibility of both you and KEO Sithat is in question as you both have attempted to conceal that you are the true biological mother of KEO Sophavatey and have provided false and misleading information, incorrect information, mislead [sic] an officer and provided bogus documentation.

On balance I can only conclude from all the information available and your response to the notification of cancellation of your visa that you have provided incorrect information in your application for a subclass 104 visa by failing to disclose your defacto relationship with KEO Sithat and your mutual child from that relationship. By failing to disclose this information you have gained an immigration advantage that you would not have been entitled to if this information had been known at the time of the decision to grant the

subclass 104 Remaining Relative visa.

This decision is not reviewable under Part 5 or Part 7 of the Act.

As you are no longer the holder of an Australian visa, you are not entitled to travel to Australia. If you do you will be refused immigration clearance and will be removed from Australia. Relevant posts in Australia have been advised that your visas have been cancelled. You may wish to make another application for a visa, however I can give no indication of the possible outcome of that application. You should contact your nearest Australian mission for further information.

If you wish to travel to Australia you will need to make another visa application. However, I can give no indication of the possible outcome of that application. Please contact your nearest Australian mission for further information.

[emphasis added]

38 When the matter was before me in July and August, I was deeply troubled by the emphasised paragraph of the delegate's letter, at [37] above. I assumed that I had before me, in the court book prepared by the respondent, all relevant documents. The relevant notice to practitioners makes clear that all relevant documents are to be included in the court book. At the time of the preparation of the court book, the application was based on s 39B of the *Judiciary Act 1903* (Cth). The grounds of the original application were set out in an affidavit accompanying the application. The affidavit did not allege lack of good faith, though it did allege, amongst other things, a denial of natural justice. The amended application was filed in Court on 25 July 2002. It relied on the grounds in the applicant's outline of submissions which had only been recently served on the respondent. The grounds included an allegation of lack of *bona fides* in the delegate.

39 On the evidence which was before me in July and August, I expressed, in discourse with counsel, my deep concern that the delegate appeared, in the emphasised paragraph in the letter of 7 March 2002 at [37] above, almost irrationally, to be lashing out with allegations, for the making of which he had no evidence or foundation. I will deal in a moment with the third paragraph of that letter. The fourth (emphasised) paragraph involved accusations of plain dishonesty in unparticularised respects.

40 As to the third paragraph of the delegate's letter, I had no other evidence before me of the interview with Mr Moeung Sen. The only inconsistency between what Mr Moeung Sen was

stated to have said and what the applicant and Mr Sithat Keo claimed, was that Mr Moeung Sen said that they had lived in a de facto relationship and they denied that a relationship of that nature had existed, though they conceded *a* relationship and a child born of that relationship.

41 This seemed an entirely inappropriate basis for the grave allegations in the emphasised paragraph. I said as much to counsel, in strong terms. I also indicated that I was deeply troubled about the *bona fides* of a delegate who behaved in this way.

42 At this point, Mr Smith sought an adjournment on the basis that he was concerned that there may be further documents shedding light on the matter. That application was opposed. I granted the adjournment, reserving the question of costs.

43 A further bundle of documents in the form of a second court book was filed on 19 August 2002.

44 At the adjourned hearing in September, the new bundle of documents was admitted into evidence, as had been the original court book.

45 Before dealing with this additional evidence, it is necessary to add two comments about the delegate's letter of 7 March 2002 and its relationship to the Notice. First, however groundless and irrational it appeared to be, it fortified a view that what the second bullet point in the decision record, and the reference to false and misleading statements in the letter of 7 February 2002 were directed to was something involving dishonesty. Secondly, this illumination, to a degree, clarified the latent ambiguity in the word "false" as used in the Notice. "False" can also mean merely inaccurate. It can mean deliberately and dishonestly so. The Notice does not make the position clear. The letter of 7 March 2002 would seem to clarify that ambiguity – it was intended to mean the provision of dishonestly inaccurate information. However, on the material before me in July and August, there appeared to be no foundation for such allegations.

46 It is now necessary to turn to the further material tendered at the resumed hearing in September.

47 The tendered documents included a “Report of Field Check”, being a note of the conversation with Mr Moeung Sen prepared by Departmental officers. It contained the following:

- ...
- *By pure chance we approached one man that the PA [Mr Sithat Keo] used to live with. This man told us that he was the governor of Chbarmon District and his name is Moeung Sen. Photos of PA and PH [the child] were shows [sic] to him, which he recognised as Sithat and PA’s daughter.*
 - *He told us that the PA was from Batdoeng (Udong) and the PA has some siblings living there. Mr Sen used to work as governor of Udong so he knew PA’s family quite closely. When he was later transferred back to be the governor of Chbarmon, PA came to stay with him in 97 or 98 for a couple of years, but PA moved out from his house some time in 2000 to resettle in Toul Kork, Phnom Penh.*
 - *We asked Mr Sen about PA’s previous marital status. Mr Sen told us that the PA was never married and PA has no deceased wife. Mr Sen said that PA used to have a defacto relationship with one girl and from that relationship they have one daughter (who was a PH in the application). Mr Sen said that girl (defacto wife) migrated to A/a a couple of years ago and now she comes back to sponsor the PA and their daughter to Australia. The SP’s photo was shown to him, he recognised it as a photograph of the mother of PH.*
 - *We asked Mr Sen if there was any engagement party at his house, Mr Sen said there was not. Photos of Loeung Srey taken together with PA were shown to Mr Sen but Mr Sen didn’t know who was she and how she is related to the PA.*
 - *From looking at the engagement photos on the file, it is possible that the photos were taken at bridal saloon [sic] shop.*

48 This record did not take the matter any further than the third paragraph in the letter of 7 March 2002, set out at [37] above. It records that Mr Moeung Sen said that Mr Sithat Keo had a de facto relationship with a girl who migrated to Australia.

49 The further material tendered also contained documents which explain the emphasised paragraph in the letter of 7 March 2002, set out at [37] above. Mr Smith referred me to the following documents:

- (a) a statutory declaration of the applicant dated 8 January 2001;
- (b) two letters apparently sent by the applicant to Mr Sithat Keo dated 28 June 2000 and

6 November 2000.

50 These documents were put forward by Mr Sithat Keo, together with other documents, in support his application for a Class 300 (Prospective Spouse) Visa. In a letter dated 12 February 2001, Mr Sithat Keo described the purpose of the documents as follows:

- ...
7. *Statutory Declaration of my sponsor regarding the circumstances under which we are known to each other and where we met;*
 8. *Copies of exchanged letters translated into English with their relevant envelopes, telephone cards and evidence of hand over of money from my sponsor Noeung Touch. Please note, everytime she calls me from Australia, she always uses the prepaid phone card. This can limit the calling time and save her money. My mobile telephone number is [number supplied]. Therefore, she could only provide the prepaid phone cards and not the telephone bills.*

51 The relevant portions of the statutory declaration of the applicant referred to by Mr Sithat Keo and dated 8 January 2001 were as follows (typographical errors appear in original):

- ...
2. *Before I came to Australia on 27/10/999, I have known Mr. Keo Sithat for many years since December 1993. In November 1993, I came from Battambang to attend the primary school teacher's training course at Central Nursery School in Phnom Penh. In December 1993, I met Keo Sithat, a student of the University of Phnom Penh, who came from Kompong Speu province to continue his study. As he used to come to play soccer at the play ground located next to my school, we often talked to each other and make friends for many years until I came to resettle in Australia in October 1999.*
 3. *Although Sithat's mother forced him to get married to a girl named Loeung Srey in June 1998, Sithat and I have still made contact with each other since. However, on 5th August, 1999, his wife died after giving birth to a baby for about 2 months at Rokar Thom in Kompong Speu province as evidenced her death certificate.*
 4. *Since his wife has died from 5/8/99, Keo Sithat often went to see me at my hometown Sisophon, province of Battambang by establishing close contact with me than before. We both have taken some photographs, before I left to live in Australia on 27/10/1999.*
 5. *After arriving in Australia, Sithat and I kept making contact with each other by exchanging letters, money and making phone calls. As we love each other, his mother and Sithat proposed me to be his legal fiancée and we plan to get married as soon as he is eligible to migrate in*

Australia.

...

52 There was no attempt before me to say that the above declaration was other than knowingly false. The child was not that of another woman who died. She was the applicant's child.

53 The two letters of the applicant to Mr Sithat Keo referred to at [49] above need not be set out in full. Mr Smith said that they were concocted. By this he meant that they were written for the purpose of being given to the Department as evidence of a blossoming personal relationship between Mr Sithat Keo and the applicant and as evidence of the child being Mr Sithat Keo's, and of the mother of the child being now deceased. Mr Henry said that the letters were equivocal. I do not need to decide this. It suffices to say that, in the light of the false statutory declaration, there was ample ground for Mr Smith's proposition.

54 I should add that enclosed with the letter of Mr Sithat Keo of 12 February 2001 ([50] above) were photographs falsely stated to be of the funeral of the mother of the child.

55 I conclude that these three documents (the statutory declaration and the two letters put forward as having been sent by the applicant to Mr Sithat Keo) and the photographs were what the delegate was referring to in the emphasised paragraph of the letter of 7 March 2002 set out at [37] above. Far from being a baseless lashing out at the applicant, the delegate had a clear basis to say what he said.

56 It is necessary, perhaps, to understand one further fact so as to place the applicant's letter of 4 March 2002 ([31] above) into proper context. On 4 February 2002, the delegate interviewed Mr Sithat Keo in connection with his visa application. (This delegate was the same delegate who cancelled the applicant's visa and refused to revoke that cancellation.) In that interview, the following exchange took place:

18. How did you come to know your sponsor? Who introduced you? What is this persons [sic] relationship/how do they know both of you?

A. In 1993 my fiancé came to study at Teacher Training school, at Boeng Kang Kong in Phno [sic] Penh. I was studying at University of Geography and normally spent evening time playing football behind the school and I met her then. (When did your relationship commence?) We started to be friends in 1993 and eventually fell in love with each other in December 1993. We went out together and exchanged photo. We went out together from 1993 to 1997 when I

finished my study. When I returned to my village my parents forced me to marry my former wife. (Why didn't you marry NOEUNG Touch?) She was still studying. (This is not what she has stated in her migration application?) She studied at teacher training centre. (I am asking about the period between 1993 and 1997?) I do not remember well, I only remember around the time I finished in 1997 that she was still studying at the teacher training centre.

19. *After she migrated to Australia what happened?*

A. After my wife died I started corresponding with her. She saw that I was poor and agreed to sponsor me.

20. *Is [sic] your sponsor has been here with you since March 2001 why have you not married here?*

A. Because all her relatives are in Australia.

21. *Where [sic] you romantically involved with your sponsor before she went to Australia?*

A. Yes.

22. *When officers from this Embassy visited your home village in Kompong Speu they obtained information to the contrary about your relationship to your sponsor and who is the true mother of your daughter. Do you wish to comment at this stage?*

A. LOEUNG Srey is the real mother of my daughter.

23. *Under Section 57 of the Migration Act, we are required to present adverse information to you and invite you to comment. On 16/1/2002, two officers from this embassy conducted inquiries at your home village in Kopmong [sic] Speu and spoke to the ex-Governor of Chbarmon District, Moeung Sen. Mr Sen told them that your name was Sithat and you were from Oudong and have siblings living there. He said you used to work for him when he was govenor [sic] and you stayed with him for a couple of years from 1997/98 but moved out to Tuol Kork in 2000. He said you have never been married and have no deceased wife. But you had a defacto relationship with your sponsor and had a child from that relationship before your sponsor went to Australia. He said she was now back in Cambodia to sponsor you and her daughter to Australia. Would you like to comment on the matter?*

A. I was married to Loeung Srey and she is the true mother of my daughter.

57 The information given to the delegate about the identity of the mother of the child was false. Mr Sithat Keo recanted it a month later in his letter of 4 March 2002. It is also important to appreciate that the delegate put fully to Mr Sithat Keo the interview with Mr Moeung Sen referred to in the letter of 7 March 2000 ([37] above).

58 At this time (4 February 2002) the applicant was in Cambodia. She and Mr Sithat Keo shared

the same post office box. Given their relationship and the now admitted maternity of the applicant's child, I would infer that they lived together in Cambodia, or, at the very least, were in close contact. I have not been assisted by any affidavit of the applicant as to whether she knew of the statements of the delegate to Mr Sithat Keo referred to in [56] above, especially with respect to question 23.

59 The applicant complains about the adequacy of the Notice. I have set out the terms of ss 128, 129 and 131 above (see [6], [16] and [36] respectively). These provisions were dealt with by Mansfield J in *Wang v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 167 and the five member Full Court which heard the appeal in *Minister for Immigration and Multicultural and Indigenous Affairs v Wang* [2002] FCAFC 228 (the five appeals together heard by this Full Court being collectively referred to as *Minister for Immigration and Multicultural and Indigenous Affairs v NAAV* [2002] FCAFC 228).

60 In *Wang, supra*, Mansfield J was of the view that the power under s 131 to revoke a visa application was not enlivened unless the Minister or his delegate had provided a proper notice under s 129. In *Wang, supra*, the record of decision was not enclosed with the covering letter. The covering letter, which was set out by Mansfield J in [8] of his reasons, gave the recipient only a general idea of the reason for the revocation in saying:

...
Your visa was cancelled on 18 July 2001 because documents attesting to your skills, qualifications and experience as a martial arts instructor have been found to be bogus.
...

61 However, his Honour concluded at [18] of his reasons:

I also find that the respondent did not comply with s 129 of the Act by giving to the applicant notice of the cancellation of the visa, of the ground of cancellation, and of the particulars of that ground and information because of which that ground was considered to exist. That deficiency in the notification of the cancellation of the visa is a significant one, as it impaired the applicant's ability to respond as s 129(1)(c) contemplates.

62 His Honour examined the construction of ss 128, 129 and 131 of the Act at [31] – [35] of his reasons and said:

[31] *As a starting point, it can be seen that the very purpose of the decision under s 131 is to reconsider the cancellation of a visa in the light of the*

response of the person whose visa has been cancelled. Section 129(1) directs that person be given certain notice, and requires that person be given the opportunity to respond to the reasons for cancellation within the specified time: s 129(1)(c). Absent any such response, the respondent does not have to proceed to any reconsideration under s 131 of the Act. It is only by reason of that response to the notice that the respondent is obliged by s 131 to reconsider his decision. Although s 131 does not expressly oblige the respondent to consider the response, in my view it is clear that that is what it provides for. Accordingly, the jurisdictional fact which s 131 prescribes, and upon which the decision under s 131 is to be made, is the response of the applicant to the notice under s 129(1). It is only upon the response that the respondent can then address whether he is satisfied that a ground existed for the cancellation of the visa (s 131(1)(a)) or whether he is satisfied that there is another reason why the cancellation of the visa should be revoked (s 131(1)(b)). The material that s 131 requires the respondent to address in making that decision is the “response to a notice under s 129 of the cancellation of a visa”.

[32] *It is the scheme of subdivision F of Div 3 of Pt 2 of the Act that it is only by consideration of a response to a notice under s 129 that a valid decision may be made: see e.g. Tickner v Chapman (1995) 133 ALR 226 per Black CJ at 238 and per Kiefel J at 268.*

...
[33] *In this matter, the precondition to the entitlement to making a decision under s 131 did not exist. There was no response to a notice under s 129 because no proper notice under s 129 was given. There is no contention that the letter given on 18 July 2001 constituted **substantial compliance** with that section, as the Reasons for Decision which would have provided the information required by s 129(1)(c) were not enclosed. As the applicant’s response of 21 August 2001 shows, the absence of that information meant that the applicant’s response was not a response to a notice under s 129. It did not properly **engage the issue** whether the ground for cancellation of the visa did not exist **because the applicant was not given the information required so as to enable him to do so.***

[34] *In my judgment, the circumstance is not simply one where a procedural prescription imposed as part of the process of decision-making has not been complied with. It is one where the jurisdictional fact prescribed by the Act, and one which is also the essence of the material upon which the Minister is entitled and obliged to make a decision, has been shown not to exist. **The purpose of the decision-making process under s 131 has been frustrated.** If I may paraphrase Stephen J in Green v Daniels (1977) 51 ALJR 463 at 465, the respondent has wrongly precluded himself from attaining the requisite state of satisfaction.*

[35] *In view of my characterisation of the nature of the decision to be made under s 131, and my view that the existence of a response to a valid*

notice under s 129(1), or at least to a notice which is adequate to elicit a meaningful response to the reasons for the cancellation of the visa, is an essential pre-condition to a valid decision under s 131, I consider that it is not intended by the Act that s 474(1) should preclude the grant of appropriate relief under s 39B of the Judiciary Act in the present circumstances. The decision under challenge is really no decision at all, because the respondent was not empowered in the circumstances to form any satisfaction in terms of s 131(1)(a) or (b). He did not have before him to enliven that power, and to impose the obligation to exercise it, a response to a notice under s 129(1). The absence of such a response is not “a mere defect or irregularity which does not deprive [him] of the power” to make the decision: Deputy Commissioner of Taxation v Richard Walter Pty Ltd (1995) 183 CLR 168 per Mason CJ at 180.
[emphasis added]

- 63 The appeal against the orders of Mansfield J was dismissed in *NAAV*, *supra* (by majority). Black CJ said at [37]:

*...When visa cancellation and revocation of visa cancellation are seen as separate areas of decision-making, the fundamental structure – now revealed - of the s 131 scheme for revocation of a visa cancellation is that it is enlivened, and enlivened only, by a notice **having a particular quality**. The learned primary Judge found that the notice provided to Mr Wang did not have that quality, and the contrary was not argued before us. Viewed in that light, an “inviolable limitation” on the power to revoke a cancellation under s 131 is that the fundamental requirement, the notice mandated by s 129, must have been satisfied: see *Rent Controller* [(1947) 75 CLR 361]. The learned primary Judge correctly held that the requirement was not satisfied in the case of Mr Wang. Accordingly, the power to refuse to revoke the cancellation of his visa was not enlivened. It follows that I would dismiss the Minister’s appeal.*
[emphasis added]

- 64 Wilcox J at [371] agreed with Mansfield J, in particular [34] and [35] of his Honour’s reasons (see [62] above).

- 65 French J noted that there was no appeal from the conclusion of Mansfield J that the s 129 notice was so inadequate as to deny the notifying letter the character of a notice under s 129. French J said at [590]:

It is important to note that, in this case, the unchallenged finding of his Honour was that the notification required by s 129 had not been given. That finding was premised on an equivalence between an insufficient notification and no notification at all, which equivalence was not in issue. No argument was advanced that notification of the cancellation had been given despite the

failure to provide particulars of the ground of cancellation and the information on which it was based (s 129(1)(b)). There is, for the purposes of this appeal, no distinction to be drawn between this case and the case in which no notification of any kind was given. The ministerial argument invites the conclusion that a failure to notify the former visa-holder under s 129 does not invalidate a decision, taken at some time after cancellation, not to revoke the cancellation.

66 French J viewed the satisfaction of the requirements of s 129 as a condition precedent to the function in s 131 arising. Thus, if there is no notice under s 129, there could be no response to a notice, so that as a matter of power the delegate could not as yet make a decision under s 131, and if he had purported to do so, that was not authorised by the Act, even taking account of s 474.

67 It will be necessary, in a moment, to refer, once again, to the Notice. However, to foreshadow that discussion, it was submitted by Mr Smith that the Notice was a notice for the purposes of s 129. Involved in that submission was the proposition that, to the extent that it could be said that there was not strict and complete adherence to the requirements of s 129, that did not invalidate the Notice. This question, as to the extent of non-compliance with the requirements of s 129, and when a notice ceases to be a notice for the purposes of s 129 and, so, s 131, was not the subject of decision in the Full Court in *NAAV, supra*. There was no appeal from the conclusion Mansfield J that there was no notice.

68 It is necessary to understand, from the terms and purpose of s 129, whether failure to comply with the terms of the section invalidates the act contemplated by the section, and, if so, what degree of non-compliance brings about that result: cf *Project Blue Sky v Australian Broadcasting Authority* (1988) 194 CLR 355. It is necessary to discern a legislative purpose to invalidate an act (here, the production and despatch of a notice) that fails to comply with the relevant section: *Project Blue Sky, supra*, at 389.

69 There were comments by way of *obiter dicta* in the Full Court in *NAAV, supra*, addressing the question: see [63], [64] and [66] above. In *Wang, supra*, Mansfield J referred to a notice “properly engaging the issue” so as to enable the erstwhile visa holder to grapple with the matter; to the “frustration” of the purpose of the section by the non-existence of a jurisdictional fact; and to a notice “adequate to elicit a meaningful response”.

- 70 In *Darko v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 775, Tamberlin J dealt with a notice which it was common ground did not comply with s 129 of the Act. The debate proceeded from that premise. The respondent Minister in that case put forward submissions about ss 128 to 131 which attracted the approval of the minority of the Full Court in *NAAV, supra*.
- 71 Section 129 plays an important role as a jurisdictional precursor to the enlivening of function under s 131. The notice is an essential preliminary to the exercise of a statutory function; it is not merely a procedural aspect or condition in the exercise of a function. There must, it seems to me, be sufficient compliance with the requirements of the section that, objectively assessed, the notice informs the erstwhile visa holder of the substance of the matters identified in the section and provides the intended statutory opportunity to consider the content of the notice so as to enable her or him to provide a meaningful response. A departure from such substantial compliance will, it seems to me, invalidate the notice, because, in such a circumstance, the opportunity to respond has been impaired, as a matter of substance. Whilst the assessment of the adequacy of the notice is to be objective, due account must be taken of the context in which the particular notice is sent to the recipient. What is a clear notification of relevant matters to one person may not be to another, if one has regard to the context of the parties giving and receiving the notices in question: see *Harihar Banerji v Ramsashi Roy* (1918) LR 45 Ind App 222, 225 cited by Isaacs J in *Burnham v Carroll Musgrove Theatres Ltd* (1928) 41 CLR 540, 553; and, latterly, *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, 768, 780.
- 72 The question is whether there has been sufficient or substantial compliance here such that it can be said that the purpose of the section has been fulfilled. It is necessary to appreciate what s 129 requires. The notice *must*:
- (a) state the ground or grounds on which the visa was cancelled;
 - (b) give particulars of the ground;
 - (c) give particulars of the information because of which the ground was considered to exist; and
 - (d) invite a response as to the matters in pars 129(1)(c)(i) and (ii) within the prescribed time.
- 73 The tripartite division of information in (a), (b) and (c) above will not always be easy to

apply, such that what is involved in each integer can be seen to be separate. Sometimes, it will be straightforward to say: the ground is section X of the Act; particulars of the ground are as follows (being in all likelihood the elements of the section of the Act in question); and the information as to why the ground is considered to exist is as follows. If the underlying proposition is simple, there may be little to differentiate (b) and (c) – particulars of the ground and particulars of the information because of which the ground was considered to exist. Also, if the evidentiary material before the delegate is voluminous, it may not be necessary to exhaustively recount it all, identifying every detail of it. What is required are *particulars* of the information because of which the ground is considered to exist. As I said in *Paul v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 396 at [104] and [116], in discussing not dissimilar words in s 424A of the Act, being words evincing a similar statutory purpose to those in par 129(1)(b):

[104] *The evident purpose of s 424A is to play its part in the provision of a procedural analogue to the common law of procedural fairness. I think s 424A should be looked at with a purpose in mind of ensuring that the claimant is fairly informed of information adverse to his or her case (in the manner described by the section) so that investigation may be made, and steps may be taken, somehow, if possible, to meet it. The extent of particulars of any information should be looked at in a common sense way in the context of the matter in hand and with fairness to the applicant in mind. A consideration of these matters is obviously affected by the chosen approach of the Tribunal. Particulars of information need to be provided to the applicant so that the applicant understands what is the relevant information to the review. This very much depends upon what the Tribunal takes to be relevant*

[116] *The question as to whether information would be the reason or a part of the reason for affirmation is ultimately decided, in my view, by whether it can be characterised as sufficiently important to the reasoning process in the rejection of the appellant's claims, for fairness to warrant that the applicant be told of it so that he or she can understand and be able to meet the integers or elements that make up the Tribunal's reason or conclusion thusfar reached (hence "would") for finding adversely to the applicant.*

74 Returning to the Notice, it referred to two sections when identifying the grounds for the decision: par 116(1)(d) and s 101. Plainly s 101 was an inadequate identification of the statutory grounds. Section 104, at least, was also relied upon. I do not think, however, that the failure to nominate the section or sections of the Act is fatal so long as the Notice, read fairly, indicated what the grounds were. The matters set out in [10] above, read together, do

purport to state the grounds. There are three matters, set out in the three bullet points, which express both the grounds and the particulars of the grounds.

75 As I have earlier said ([30] above), the three bullet points were intended to identify three quite separate complaints:

- (a) The *incorrect* information in the application form.
- (b) The *false* and *incorrect* information provided about the applicant's marital status and the existence of the child.
- (c) The failure to notify the change of circumstances in relation to the de facto relationship and the child.

76 Reading the Notice as a whole, the matters set out in [10] above and summarised in [75] above have bound up within them the statement of the grounds and the particulars of the grounds.

77 It is plain from his letter of 7 March 2002 ([37] above) that the delegate was intending in the second bullet point in the Notice (see [10] and [75(b)] above) to identify the subject matter dealt with at [49] - [55] above. "False" in the second bullet point was intended to mean "dishonest".

78 Was there adequate particularisation of the information because of which the matters in the three bullet points in [10] above and summarised in [75] above were considered to exist? I do not think so.

79 First, there was no reference to the information received from Mr Moeung Sen. True it is (and Mr Smith strongly relied on it) that the essence of what Mr Moeung Sen told the officers was disclosed: that the applicant had a de facto husband and a child. Mr Smith said that the *evidence* does not have to be disclosed. He submitted that the two sets of particulars required by par 129(1)(c) can be found bound up in the three bullet points in [10] above. Despite Mr Smith's clarity of argument, I am unpersuaded. The matter is to be judged by reference to the kinds of considerations to which I made reference in *Paul, supra*. The judgment as to what fairness requires is sharpened by the appreciation that there is no hearing available to the applicant here; the erstwhile visa holder is outside Australia and she or he gets one chance, on the papers, to change the mind of the delegate. This is not a case where to identify the source

of the information would be either oppressive or tangential. If one asks why (“because of”) the ground was considered to exist, that is, why the delegate thought that the applicant had failed to disclose the fact of a de facto marriage and a child, one could either say: because he discovered this to be the case; or because he discovered this to be the case when told by a man (naming him or not) who knew Mr Sithat Keo from his village. The ground is the failure to tell the Department something. In this context, the identification of the information because of which the delegate considered that to be the case is the interview with Mr Moeung Sen. If told about that interview, the applicant would then be able to investigate and take steps to meet the issue (cf *Paul, supra* at [104]).

80 For instance, here there is only one difference between the applicant’s version of events in her letter of 4 March 2002 ([31] above) and the note of the Moeung Sen meeting ([47] above): that is, whether or not the relationship between the applicant and Mr Sithat Keo, though admittedly sexual, was a de facto marriage. Without wishing to say anything about the customs of Cambodia, it would be a bold proposition in Australia, for many years past, to say that because a young woman had a child, she must have been in a “de facto marriage” or “de facto relationship”. At least in part, it may depend upon what meaning and in what context those phrases are used.

81 The importance of the matter is highlighted by the form and structure of the application form signed by the applicant in 1995. The questions requiring the disclosure of children were predicated upon a “yes” answer to the following question:

“Have you previously been married or been in a de facto/common law relationship?”

82 Whilst Mr Smith’s argument is not without force, I think the Notice should have identified the Moeung Sen interview in the particulars of the information, just as the delegate confronted Mr Sithat Keo with that interview on 4 February 2002 ([56] above]). I do not think that this latter disclosure orally to Mr Sithat Keo was an adequate surrogate for compliance with par 129(1)(c) in respect of the applicant.

83 Secondly, there was no identification of the information said to have been provided falsely and dishonestly. In human terms, the delegate might have been forgiven for thinking that the applicant knew full well that in the second bullet point (see [10] above) he (the delegate) was

referring to the false statutory declaration and the other material referred to at [49] to [55] above. However, given the purpose of the Notice, I think it was incumbent on him to squarely confront the applicant with such behaviour, if it was a ground, as I think the Notice when read with the letter of 7 March 2002 makes plain it was. She may have been able to point to some ameliorating or excusing factor; she may well not. However, the statutory purpose of the Notice was to provide the applicant with her one chance to change the mind of the delegate, by squarely putting the relevant matters to her so that she could respond to them.

84 Mr Smith argued that the grounds identified in the Notice were ss 101 and 104; that is, the provision of inaccurate information in the application form and the failure to provide information thereafter. He identified the dishonest provision of information to which I have referred as referable not to the grounds upon which the decision could be made, but to the exercise of the discretion to cancel the visa founded in the word “may” in s 128 of the Act. If this be right, the particulars demanded by par 129(1)(b) all relate to the “ground” referred to in par 129(1)(a), that is the breaches of ss 101 and 104. If this argument be correct, what has occurred by the failure to bring to the attention of the applicant the delegate’s view as to the dishonesty, is a failure to accord the applicant procedural fairness. On this basis, if the Notice be otherwise in conformity with s 129, the operation of s 474 would lead to the conclusion that, notwithstanding a denial of natural justice or procedural fairness, the delegate was authorised to make the decision which he made.

85 However, as I have said earlier, the grounds were three, not two. Though the Notice is somewhat ambiguous in the second bullet point, that ambiguity is caused by the absence of the required particulars. If the Notice had squarely identified the false statutory declaration and other material to which I referred, the second bullet point would have been illuminated with great clarity. When one reads the letter of 7 March 2002 and in particular the emphasised paragraph in [37] above, it is plain that that was a matter which very much affected the view of the delegate (and rightly so). The information as to this false and dishonest material was before the delegate on 7 February 2002. I do not think that it is a matter limited to the exercise of the discretion in s 128 and s 131. Rather, I think it was one of the grounds identified in the Notice in the second bullet point and so should have been particularised.

86 Again, in human terms, the delegate may have been forgiven for thinking that he had plainly

put to the person whom he regarded as the applicant's de facto husband on 4 February 2002 matters which must have made plain to him and to the applicant that the time had come to tell the Department the truth about their relationship and the child. Notwithstanding that the delegate confronted Mr Sithat Keo with the interview with Mr Moeung Sen on 4 February 2002, Mr Sithat Keo on that day maintained the story of the dead wife being the mother of the applicant's and his child. Whether it was the interposition of Mr Turner or the dawning realisation that they could not continue with the falsity, the fact is that by early March 2002 both the applicant and Mr Sithat Keo brought forward the truth about the maternity of the child. In these circumstances, the delegate could perhaps be forgiven for thinking that the applicant appreciated, fully, the totality of what he was referring to in the three bullet points at [10] above.

87 However, I think the purpose of s 129 required the Notice to give particulars of the dishonestly provided information and to give particulars of the information because of which the delegate considered that incorrect information had been dishonestly provided to the Department. This required, I think, that the statutory declaration, letters and other material referred to earlier be squarely put to the applicant.

88 Thirdly, the applicant was entitled to a further twenty-two days or thereabouts to answer this Notice. She was not given that time. Even if I am wrong in the first two matters of deficiency to which I have just referred, given another twenty-two days, the applicant may have been able to bring forward further information. It may be that, with further time, Mr Moeung Sen could have been found and any clarification necessary (if it were available) could be brought forward. Although the delegate had not informed the applicant of the Moeung Sen interview, he had orally informed Mr Sithat Keo of it. There is no evidence before me as to whether or not Mr Sithat Keo told the applicant of what the delegate told him. Perhaps I could infer that he did. In that case, it might be argued that there was already an opportunity to bring that matter forward which was not availed of. However, there was a degree of shortness of time as identified by Mr Turner in his letter of 8 March 2002 ([26] above). I cannot be sure that the provision of adequate time as specified in the statute and regulations would not have led to a fuller response, and one grappling with the de facto issue, and, perhaps, the dishonesty issue.

89 Mr Smith says that the response (which I have set out in full at [31] above) of the applicant

was full and detailed. Indeed it was. It was a meaningful response, as far as it went. However, s 129 provides for a time period as prescribed. The applicant was not given that time. That, I think, is a substantial deficiency in the Notice of itself.

90 For the above reasons, I think that the Notice was substantially inadequate to meet the requirements of s 129. In these circumstances, on the proper construction of ss 129 and 131, I do not think that there was a response to a notice for the purposes of s 131; and, so, I do not think that the authority to undertake the function in s 131 was enlivened.

91 I will provide the parties with an opportunity to consider these reasons to consider the formulation of appropriate orders, including appropriate orders as to costs.

I certify that the preceding ninety-one (91) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Allsop.

Associate:

Dated: 25 October 2002

Counsel for the Applicant: M S Henry

Solicitor for the Applicant: Yandell Wright Stell

Counsel for the Respondent: J Smith

Solicitor for the Respondent: Clayton Utz

Dates of Hearing: 25 July 2002; 8 August 2002; and 24 September 2002

Date of Judgment: 25 October 2002